

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

NOV 14 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0199-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ARTHUR FREDRIC GERTH,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR94019036

Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

Arthur F. Gerth

Tucson
In Propria Persona

V Á S Q U E Z, Judge.

¶1 After a jury trial, petitioner Arthur Gerth was convicted in 1995 of armed robbery, aggravated robbery, aggravated assault, and criminal damage. The trial court sentenced him to concurrent prison terms of fifteen years on the first two counts, eight years on count three, and three years on count four. The terms were enhanced with one prior felony conviction, and the terms for counts two through four were ordered to be served in

their entirety as “flat-time terms,” the offenses having been committed while Gerth was on probation. This court affirmed the convictions and the sentences on appeal. *State v. Gerth*, No. 2 CA-CR 95-0162 (memorandum decision filed Oct. 22, 1996). Gerth has sought post-conviction relief several times, and this court has denied relief on review. *State v. Gerth*, Nos. 2 CA-CR 96-0738-PR, 2 CA-CR 97-0425-PR (consolidated) (memorandum decision filed June 30, 1998); *State v. Gerth*, No. 2 CA-CR 98-0619-PR (memorandum decision filed Sept. 21, 1999). In his current petition for review, Gerth challenges the trial court’s order denying a subsequent petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and his motion for reconsideration. We will not disturb a trial court’s order denying post-conviction relief absent an abuse of discretion. *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (App. 1986).

¶2 In November 2007, Gerth filed a pro se notice of post-conviction relief in which he maintained that, because the court had imposed a flat-time sentence on count two, the court could not impose a consecutive term of community supervision. He contended these were “newly discovered facts” that came to light after he had “a discussion with a couple of ‘legal beagals’, (sic) regarding House Bill 2299 and good time credits to be changed by said Bill.” Gerth explained he had not filed a petition raising this claim because he was “hoping that it wo[uld no]t be necessary . . . to file the actual petition for post-conviction relief by reason that this mistake might be corrected without taking up too much of th[e] court[’]s time.” Appointed counsel filed a supplemental petition in January 2008 stating the argument Gerth had raised in his pro se petition appeared to have merit.

Relying in part on A.R.S. § 41-1604.07, counsel asserted that, because he was not eligible for suspension, commutation, or release on any basis, he could not be ordered to serve a term of community supervision under A.R.S. § 13-603(I). Counsel asserted that to permit a term of community supervision after the flat-time term would result in a sanction “beyond the statutory maximum provided.”

¶3 In April 2008, after considering the entire record, the petition for post-conviction relief, the reply, and the supplemental petition, the trial court denied the petition for post-conviction relief, finding “the matters contained in the Petition for Post Conviction Relief lack sufficient basis in law and fact to warrant further proceedings herein and no useful purpose would be served by further proceedings.” In May 2008, the court denied Gerth’s motion for rehearing. Gerth challenges the court’s ruling on review, reiterating his claim that he could not be ordered to serve a consecutive term of community supervision on the flat-time prison term on count two.

¶4 We note at the outset that the trial court correctly could have denied Gerth’s request for relief on the ground that his claim was precluded. Gerth had an appeal and an initial post-conviction proceeding and could have raised this claim in either. *See* Ariz. R. Crim. P. 32.2(a). To the extent the term of community supervision even arguably was illegal, such a claim is not excepted from the rule of preclusion. *See* Ariz. R. Crim. P. 32.2(b) (excepting from purview of preclusion only claims that fall under subsections (d), (e), (f), (g), and (h) of Rule 32.1); *see also State v. Swoopes*, 216 Ariz. 390, ¶¶ 41-42, 166

P.3d 945, 958 (App. 2007) (unless personal, constitutional right is involved, fundamental error may be subject to rule of preclusion).¹

¶5 The trial court nevertheless correctly decided this claim on its merits. Division One of this court rejected this very claim in *State v. Jenkins*, 193 Ariz. 115, ¶ 13, 970 P.2d 947, 951-52 (App. 1998). And no change in the law affects the propriety of that ruling as it relates to Gerth’s flat-time term of imprisonment on count two. A term of community supervision is not a prison term, nor must it be served during the term of imprisonment the trial court imposed. Rather, it is a period of supervision that is intended to follow the completed sentence. *See State v. Uriarte*, 194 Ariz. 275, ¶¶ 27-28, 981 P.2d 575, 580 (App. 1998).

¶6 We grant the petition for review, but because the trial court did not abuse its discretion, we deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge

¹A claim for post-conviction relief based on an illegal sentence is raisable under Rule 32.1(c).